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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 449

E. W. CLARK, AS RECEIVER, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY, AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA AND BRIEF IN SUPPORT THEREOF.

M. S. GUNN,
Of Counsel,
Helena, Montana.

COOK & BALLUFF,
GUNN, RASCH, HALL & GUNN,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Summary of petition and brief	1-3
Petition for writ	3
Statement of matter involved	3-7
Reason for issuance of writ	7, 8
Brief in support of petition	9
Jurisdiction	9
Statement of case	9
Error relied upon for issuance of writ	10
Argument and authorities	10
Conclusions	14

Table of Cases.

Bernheimer v. Converse, 206 U. S. 516	13
Cogliano v. Ferguson, 139 N. E. (Mass.) 527	13
Converse v. Hamilton, 224 U. S. 243	12
Hancock National Bank v. Farnum, 176 U. S. 640	11
Kinsler v. Casualty Co. of America, 172 N. W. (Neb.) 33	14
Lion Bonding & Surety Co. v. Karatz, 280 Fed. 532	13
Morgan v. New York, etc., Ass'n, 46 Atl. (Conn.) 877	14
Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257	14
Parsons v. Charter Oak Life Ins. Co., 31 Fed. 305	13
Relfe v. Rundle, 103 U. S. 225	11
Roche v. McDonald, 275 U. S. 449	11
State ex rel. Attorney General v. Fidelity Loan & Trust Co., 113 Iowa 439	7, 11
Sterrett v. Second National Bank, 248 U. S. 73	13

Statutes.

Judicial Code, Section 237, as amended by Act of February 13, 1925.	8, 16
Section 8402 of the Code of Iowa, 1927 and 1931	10, 17
Section 8964 of the Code of Iowa, 1927 and 1931	10, 17
Section 8613-c1, Code of Iowa, 1931, being also Chapter 233 of the Acts of the 43rd General Assembly of Iowa	10, 18

Textbook.

Fletcher on Corporations, Vol. 17, p. 732	14

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SUMMARY OF PETITION AND BRIEF HEREWITH SUBMITTED.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The question raised is: What effect must be given by the courts of other States to statutory proceedings in the State of domicile for dissolution and liquidation of a corporation.

In a statutory proceeding by the Iowa Attorney General an Iowa court dissolved an Iowa insurance corporation and appointed the Iowa Insurance Commissioner to liquidate its business and affairs.

Thereafter a Montana court entered judgment against the corporation. Process issued under that judgment and was levied in Montana on property which had been owned by the corporation at the time of the statutory proceeding.

The Iowa Insurance Commissioner contended in the Montana courts:

1. That the Iowa statutes were part of the charter of the corporation;

2. That the statutory dissolution in Iowa terminated the corporate existence and transferred the corporate property to the Iowa Insurance Commissioner as trustee of an express trust for the benefit of creditors resident everywhere;

3. That the full faith and credit clause required the Montana courts to give that effect to the Iowa statutory proceeding;

4. That therefore the Montana judgment was against a non-existing defendant and void, and that the attempted levy was ineffectual as against the Iowa Insurance Commissioner.

The Montana Supreme Court held that, notwithstanding the dissolution in Iowa, the corporate existence was not terminated in Montana, that the judgment was valid, and that the property owned by the Surety Company in Montana was subject to execution thereunder.

If, as contended by petitioner, the question raised has been settled, then the decision of the Montana Court is contrary to the law as settled by this Court.

If the question raised has not been settled, it is of such importance as to merit consideration by this Honorable Court.

1. Because the rule announced by the Montana Court violates the Federal Constitution;

2. Because under modern business practice the rule announced by the Montana Court will result in serious confusion, and will result, as between creditors, in gross inequities, dependent largely upon accidents of geographical location of assets rather than upon sound application of rules of law or equity.

PETITION.

Your petitioner, E. W. Clark, as receiver, respectfully represents as follows:

The Federal Surety Company was prior to September 25, 1931, an Iowa Insurance corporation (R. 22). The District Court of Scott County, Iowa, on September 25, 1931, rendered a decree dissolving said corporation and appointing your petitioner, Commissioner of Insurance of the State of Iowa, receiver of its property (R. 21). Your petitioner duly qualified as such receiver (R. 31-32). On December 22, 1931, said court, by a further order or decree, adjudged and decreed that said corporation was dissolved and its corporate existence terminated on September 25, 1931, and that your petitioner "is the successor to said corporation, and as such holds title to all property owned by said company at the time it so ceased to exist" (R. 26).

The authority for the dissolution of the Federal Surety Company, the appointment of your petitioner as receiver, and vesting him with title to the property of said company, was conferred by certain sections of the Code of Iowa referred to and quoted at pages 17 and 18 of the Appendix hereto and in the decree of the Iowa court, of December 22, 1931 (R. 27).

On March 25, 1932, an action was commenced in the District Court of Cascade County, Montana, by one, John Mieyr, a general creditor of the Federal Surety Company, as plaintiff, against the said surety company and your petitioner for the purpose of securing the appointment of a receiver of the property of said company in Montana (R. 2). The laws of Iowa authorizing the appointment of your petitioner as receiver were pleaded, as was also the Iowa decree of September 25, 1931, appointing your petitioner receiver. On March 25, 1932, in the action so commenced, one D. A. Crichton, was appointed receiver of the property of said Surety Company in Montana (R. 8). Crichton as receiver duly qualified (R. 9-10).

At the time of the dissolution of the company and the appointment of your petitioner receiver by the Iowa Court, an action was pending in the District Court of Fergus County, Montana, in which respondents, Willard *et al.*, were plaintiffs, and the Federal Surety Company was defendant, to recover a money judgment. In said action, after the dissolution of the surety company by the decree of the Iowa court, and on May 20, 1932, judgment was rendered against said surety company for the sum of $14,968.90 and costs (R. 61). An execution was issued upon this judgment, and upon petition of respondents, judgment creditors, the District Court of Cascade County, in the action in which Crichton was appointed receiver on May 24, 1932, made an order granting permission to levy said execution upon the property of the surety company in Montana (R. 14). Your petitioner thereafter appeared in the action in which Crichton had been appointed receiver and filed his answer and cross-petition, praying for the appointment of said Crichton as ancillary receiver (R. 15). The plaintiff in the action answered, admitting the allegations of the cross-petition or complaint, and consented to

the appointment of Crichton as such ancillary receiver (R. 34). Thereupon an order was made confirming the appointment of Crichton as receiver, designating him as ancillary receiver, recognizing and confirming the title of your petitioner to the property of said surety company in Montana, and revoking the order of May 24, 1932, granting permission to Williard *et al.*, respondents, to levy execution upon the property of the surety company in Montana (R. 34-39). Respondents then made a motion to vacate and annul the order appointing Crichton ancillary receiver and revoking the order granting permission to levy execution upon the property of the surety company in Montana (R. 39).

Your petitioner filed objections to the granting of this motion upon the ground that to sustain same would deny full faith and credit to the judicial proceedings in Iowa, dissolving the Federal Surety Company, appointing your petitioner receiver, and vesting him with title to all of the property of said surety company wherever situated in violation of Section 1 of Article IV of the Constitution of the United States (R. 64-65).

The motion to vacate the order or decree appointing Crichton ancillary receiver and revoking the order granting permission to levy said execution was denied on August 31, 1932 (R. 66). An appeal was taken to the Supreme Court of Montana from the order denying said motion (R. 68-69).

In the opinion of the Supreme Court of the State of Montana on the appeal, it is said:

> "The appeal presents the question whether appellants have the right to be paid the amount of their claim from the Montana property before any part of such property is transmitted to the Iowa receiver for administration through the Iowa receivership,

when, as shown, their claim has been reduced to judgment and execution levied after the proceedings in the Iowa court designed to accomplish the dissolution of the corporation. Solution of the problem presented makes it necessary to determine the effect of the proceedings in the Iowa court upon the corporate life of the surety company" (R. 73-74).

"Conceding that the decree of the Iowa court resulted in a present dissolution of the surety company, the question arises: Did the action brought by the appellants abate?"

"Even though it be conceded that the appointment of the receiver in the State of Iowa operated to transfer the property of the defunct surety company to him, such involuntary assignment in aid of a statutory judicial proceeding will not be recognized outside of the jurisdiction of the appointment, where the rights of domestic creditors are involved, if the receiver has not obtained possession of the property and where the creditors have obtained rights or liens upon the property even after the appointment in the foreign jurisdiction" (R. 79).

"When the transfer of a debtor's property is the result of a judicial proceeding, there is no provision of the Constitution which requires the courts of another state to carry it into effect, and as a general rule no state court will do this to the prejudice of the citizens of its own state" (R. 80).

The Supreme Court of Montana decided that the action by Williard *et al.* against the Federal Surety Company did not abate by reason of the dissolution of the surety company by the Iowa court, that the judgment obtained by Williard *et al.* is a valid judgment (R. 77), and that the property of the surety company in Montana is subject to execution for the payment of this judgment (R. 80). The court further decided that Mieyr as a general creditor was not entitled to the appointment of a receiver of the Mon-

tana property as he had an adequate remedy at law by an attachment of the property of the surety company in Montana (R. 80). Judgment was rendered accordingly (R. 80).

Mr. Justice Angstman filed a dissenting opinion, in which it is said:

> "When a corporation is dissolved according to the laws of its domicile, it becomes a dissolved corporation everywhere, dead in every other state as well as in the state of its domicile, and an action against such foreign corporation abates on its dissolution. (Citing cases.) The decree of the Iowa court dissolving the surety company is entitled to full faith and credit in this state on that issue" (R. 82).

The Supreme Court of Iowa in the case of *State ex rel. Attorney General* v. *Fidelity Loan & Trust Company*, 113 Iowa 439, in speaking of a decree dissolving an Iowa corporation said:

> "The order of dissolution was as complete and final as it will be in a thousand years. The court was empowered by section 1640 of the Code to make it, and all have acquiesced in it as made. From the time of that entry the corporation has been dead, all its agencies ended, its employees, including attorneys, discharged; and it put, without exception or notice of appeal, beyond all future corporate activity. The effect was to 'put an end to its existence for all purposes whatsoever, and to destroy every one of its faculties, so that thereafter it can neither make nor take contracts, nor sue nor be sued, and so that all debts to or from it became extinguished, and all actions by and against it abated.' * * * To a corporation dissolution is as final as death to a person. It thereafter can have no interest in the property once by it controlled, or its disposition."

Your petitioner respectfully submits that by the decision and judgment of the Supreme Court of Montana full faith

and credit were not given to the laws of Iowa and the judicial proceedings authorized by said laws, dissolving the Federal Surety Company, appointing your petitioner receiver, and vesting him with title to all of the property of said company wherever situated.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Montana, commanding that court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cause in which said decision and judgment complained of was rendered, designated on its docket as cause numbered 7074, and that said decision and judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioner will ever pray.

E. W. CLARK,
Receiver,
By COOK & BALLUFF,
GUNN, RASCH, HALL & GUNN,
Counsel for Petitioner.

M. S. GUNN,
Of Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The opinion of the Supreme Court of the State of Montana has not yet appeared in print but will be found in the record on pages 69 to 87, inclusive.

Jurisdiction.

As appears from the petition, the ground upon which the issuance of a writ of certiorari is sought is that the Supreme Court of Montana by its decision and judgment failed to give full faith and credit to the statutes of Iowa and the judicial proceedings in that State, authorized by said statutes, dissolving the Federal Surety Company, appointing your petitioner receiver of, and vesting him with title to, all of the property of said company wherever situated, in violation of the full faith and credit clause of Section 1 of Article IV of the Constitution of the United States.

Judgment was rendered by the Supreme Court of Montana on April 1, 1933 (R. 88). A petition for rehearing was filed, and the cause was heard upon this petition on June 26, 1933 (R. 88), and the petition was denied July 19, 1933 (R. 89).

Jurisdiction to issue the writ is conferred by Subdivision b of Section 237 of the Judicial Code as amended by the Act of February 13, 1925.

Statement of Case.

By the decree of the Iowa court of December 22nd, 1931, it was adjudged and decreed: "That the defendant, Federal Surety Company, is and since September 25, 1931, has been dissolved and that its corporate existence is terminated," and that your petitioner "is the successor to said corporation and as such holds title to all property owned by Fed-

eral Surety Company at the time it so ceased to exist" (R. 30).

The decrees of the Iowa court were authorized by Sections 8402 and 9864 of the Code of Iowa of 1927 (pages 17 and 18, appendix hereto) and (R. 27-28). The Iowa court by the decree of September 25, 1931 (R. 30), found and determined that cause existed, which authorized the Attorney General of Iowa to make application for the dissolution of the Federal Surety Company and the appointment of a receiver as provided in the sections of the Iowa Code above referred to. Section 8964 authorizes the court upon such an application to "decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor" (pages 17 and 18, Appendix hereto) and (R. 28).

Chapter 233 of the Acts of the Forty-third General Assembly of Iowa provides that "The Commissioner of Insurance henceforth shall be the receiver and/or liquidating officer for any insurance company," etc. (page 18, Appendix hereto) and (R. 28).

By stipulation it was admitted by respondents that the statutes of Iowa are correctly pleaded (R. 65).

Error Relied Upon for Issuance of Writ.

The Supreme Court of Montana erred in failing and refusing to regard the dissolution of Federal Surety Company in Iowa as effective in Montana and in failing and refusing to regard your petitioner as successor to said company and the holder of title to all of the property of said company, thereby denying full faith and credit to the Iowa statutes and judicial proceedings in that State.

Argument and Authorities.

The effect of the Iowa statutes and the judicial proceedings in that State was to dissolve the Federal Surety Com-

pany and vest your petitioner as receiver with title to all of the property of said company.

State ex rel. Attorney General v. *Fidelity Loan & Trust Co.*, 113 Iowa 439.

In the case of *Roche* v. *McDonald*, 275 U. S. 449, the court said:

> "It is settled by repeated decisions of this court that the full faith and credit clause of the Constitution requires that the judgment of a state court which had jurisdiction of the parties and the subject-matter in suit, shall be given in the courts of every other state the same credit, validity and effect which it has in the state where it was rendered, and be equally conclusive upon the merits; and that only such defenses as would be good to a suit thereon in that state can be relied on in the courts of any other state."

See also:

Hancock National Bank v. *Farnum*, 176 U. S. 640.

In the case of *Relfe* v. *Rundle*, 103 U. S. 222, this Court in the opinion said:

> "Relfe is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that state, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the state, and as such represents the state in its sovereignty while performing its public duties connected with the winding

up of the affairs of one of its insolvent and dissolved corporations. His authority does not come from the decree of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was, in fact, the corporation itself for all the purposes of winding up its affairs. We are aware that, except by virtue of some statutory authority, an administrator appointed in one state cannot generally sue in another, and, that a receiver appointed by a state court has no extraterritorial power, but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the state which creates it may say who those agents shall be. One may be its representative when in active operation, and in full possession of all its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs. No state need allow the corporations of other states to do business within its jurisdiction unless it chooses, with perhaps the exception of commercial corporations; but if it does, without limitation express or implied, the corporation comes in as it has been created. Every corporation necessarily carries its charter wherever it goes, for that is the law of its existence. It may be restricted in the use of some of its powers while doing business away from its corporate home, but every person who deals with it everywhere is bound to take notice of the provisions which have been made in its charter for the management and control of its affairs both in life and after dissolution."

In the case of *Converse* v. *Hamilton*, 224 U. S. 243, this Court considered the right of a receiver of a Minnesota corporation appointed by a court in that State to maintain an action in Wisconsin to enforce a stockholder's liability. In the opinion, it is said:

"But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota, he became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere. So, when he invoked the aid of the Wisconsin court, the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce for the benefit of his *cestuis que trustant* a right of action, transitory in character, against one who was liable contractually and severally, if at all. The receiver's right to maintain the actions in that court was denied in the belief that it turned upon a question of comity only, unaffected by the full faith and credit clause of the Constitution of the United States, and this view of it was regarded as sustained by the decision of this court in *Finney* v. *Guy*, 189 U. S. 335, 47 L. Ed. 839, 23 Sup. Ct. Rep. 558. But that case is obviously distinguishable from those now before us."

In concluding the opinion, this Court said:

"In these circumstances we think the conclusion is unavoidable that the laws of Minnesota and the judicial proceedings in that state, upon which the receiver's title, authority, and right to relief were grounded, and by which the stockholders were bound, were not accorded that faith and credit to which they were entitled under the Constitution and laws of the United States."

See also:

Sterrett v. *Second National Bank*, 248 U. S. 73;
Bernheimer v. *Converse*, 206 U. S. 516;
Parsons v. *Charter Oak Life Ins. Co.*, 31 Fed. 305;
Lion Bonding & Surety Co v. *Karatz*, 280 Fed. 532;
Cogliano v. *Ferguson*, 139 N. E. (Mass.) 527;

Morgan v. *New York, etc. Assn.*, 46 Atl. (Conn.) 877;
Kinsler v. *Casualty Co. of America*, 172 N. W. (Neb.) 33;
Fletcher on Corporations, Permanent Ed., Vol. 17, p. 732.

The right to prosecute an action against a dissolved corporation is determined by the law of the State in which the corporation is created.

Oklahoma Natural Gas Co. v. *Oklahoma*, 273 U. S. 257.

In the opinion in the case just cited, this Court said:

> "It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect.' (Citing many cases.) It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation *pro hac vice*. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. *The matter is really not procedural or controlled by the rules of the court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being.*" (Italics ours.)

Conclusions.

The Supreme Court of Montana in deciding that the action prosecuted by the respondents against the Federal

Surety Company in the District Court of Fergus County, and in which judgment was recovered long after the dissolution of said company by the Iowa court pursuant to the statutes of that State, was not abated by such dissolution, denied full faith and credit to such statutes and judicial proceedings.

The Montana Supreme Court also failed to give full faith and credit to such statutes and judicial proceedings in deciding that the property of said surety company in Montana is subject to execution issued upon the judgment recovered by respondents, and subject to attachment to satisfy any claim of the plaintiff in the action in which Crichton was appointed ancillary receiver.

Respectfully submitted,

COOK & BALLUFF,
GUNN, RASCH, HALL & GUNN,
Counsel for Petitioner.

M. S. GUNN,
Of Counsel for Petitioner.

APPENDIX.

Statutes.

Judicial Code, Section 237, as Amended by Act of February 13, 1925.

(*a*) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

(*b*) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such

a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

(*c*) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: PROVIDED, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title.

Section 8402, *Code of Iowa,* 1927 *and* 1931, *Being Also Section* 1640 *of the Code of Iowa,* 1897.

Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the State of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them.

Section 8964, *Code of Iowa,* 1927 *and* 1931, *Being Also Section* 1731 *of the Code of Iowa,* 1897.

The commissioner of insurance shall, when he finds it expedient, appoint one or more persons, not officers, agents, or stockholders of any insurance company doing business in the state, to examine into the affairs and condition of any such company incorporated or doing business therein, or make such examination himself, and the officers or agents thereof shall produce their books for the inspection of the examiners and otherwise assist therein, so far as

they can do so; and in conducting the investigation they may examine under oath the officers or agents of any company, or others, relative to the business and condition of the company, and the result thereof shall be published in one or more papers in the state, when the commissioner believes the public interest requires it. When it appears to the commissioner from such examination that the assets and funds of any company incorporated in this state are reduced or impaired by its liabilities, as defined under the head of liabilities in the statement required by this chapter, more than twenty per cent below the paid-up capital stock required, he shall direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition, or he shall communicate the fact to the attorney general, who shall apply to the district court, or if in vacation to one of the judges thereof, for an order requiring the company to show cause why its business shall not be dissolved. The court or judge, as the case may be, shall thereupon proceed to hear the allegations and proofs of the respective parties; and in case it appears to its or his satisfaction that the assets and funds of said company are not sufficient, as aforesaid, or that the interest of the public requires it, it or he shall decree a dissolution of said company and a distribution of its effects, and appoint a receiver therefor. The application of the attorney general may be by the court or judge sent to a referee to inquire into and report upon the facts stated therein, which report shall be made to the court or judge.

Section 8613-c1, *Code of Iowa*, 1931, *Being Chapter* 233 *of the Acts of the* 43*rd General Assembly of Iowa.*

The commissioner of insurance henceforth shall be the receiver and/or liquidating officer for any insurance company, association or insurance carrier, and shall serve without compensation other than his stated compensation as commissioner of insurance, but he shall be allowed clerical and other expenses necessary for the conduct of such receivership.